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No. 95-2031

IN THE
Supreme Court of the United States
October Term, 1995

THOMAS YOUNG, *ET AL.*,
Appellants,

v.

KIRK FORDICE, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF IN OPPOSITION TO MOTION TO AFFRIM

A. SPENCER GILBERT, III
J. WILLIAM MANUEL
WISE CARTER CHILD & CARAWAY
401 East Capitol Street
Suite 600
Jackson, MS 39201
(601) 354-2385

BARBARA R. ARNWINE
THOMAS J. HENDERSON
*BRENDA WRIGHT
SAMUEL L. WALTERS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G St., N.W., Suite 400
Washington, D.C. 20005
(202) 662-8320

* Counsel of Record

Counsel for Appellants

(Additional Counsel Listed On Inside Cover)

16 pp

(Listing of Counsel Continued From Outside Cover)

LAUGHLIN MCDONALD
NEIL BRADLEY
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

MARGARET CAREY
CENTER FOR
CONSTITUTIONAL RIGHTS
213 Main St.
Greenville, MS 38701
(601) 334-1122

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BRIEF IN OPPOSITION
TO MOTION TO AFFIRM

Mississippi's chosen procedures for implementing the NVRA have created a dual system under which thousands of voters were registered in 1995 without being informed that they would be ineligible to vote in state and local elections once registered. This dual system, including the subsequent removal of thousands of registered voters from the voter rolls for state and local elections, *in a gubernatorial election year*, was implemented without Section 5 preclearance. To accept the argument that these changes, which directly affect access to the franchise, are exempt from the preclearance requirement, would judicially repeal Section 5's most important protections. The appellees (hereafter, the "State"), offer no tenable theory for upholding the decision below, and this Court should summarily reverse or note probable jurisdiction.

1. The State's primary argument is that the tabling of NVRA legislation by a committee of the Mississippi Legislature on January 25, 1995, implicitly redefined the State's then-pending Section 5 submission. Under this theory, the State's December 1994 Section 5 submission may have initially contemplated a unified NVRA registration system, but the nature of the submission changed as of January 25, 1995, the day the legislative committee tabled the pending NVRA legislation. Thus, the State concedes that "there are certain choices that States may make in implementing the [NVRA] which may require submission for preclearance for those States covered by Section 5," but contends that in light of the legislative committee's action the State decided to make only two such discretionary choices here -- the choice of "discretionary agencies which will be used in implementation" and of "purging procedures." Motion to Affirm at 9.

The clear problem with this argument is that the event which allegedly defined the State's "choices" with respect to NVRA implementation did not occur until January 25, 1995, long *after* the State made its actual Section 5 submission to the Attorney General. The State never made a Section 5 submission which defined its new NVRA choices in the narrow manner now urged by the State, nor did the State withdraw its earlier, much broader submission which clearly contemplated the implementation of NVRA procedures for all elections, federal, state and local. *See* J.S. at 5-6. Although the State communicated in writing with the Attorney General on January 26 and January 31, 1995, those communications say nothing about the effect of the legislative committee's action, nor about any desire on the part of the State to alter or redefine the Section 5 submission. U.S. Mot. for Prelim. Inj. & Summ. Judg. Ex. E.

The Attorney General's mere awareness of the legislative committee's action and of possible uncertainties created by that action does not convert the State's December 1994 Section 5 submission into a submission of the changes later made in the State's February 10, 1995, memorandum. This Court has definitively and repeatedly rejected the concept of submissions by implication. *McCain v. Lybrand*, 465 U.S. 236 (1984); *Clark v. Roemer*, 500 U.S. 646 (1991); *Dupree v. Moore*, 831 F. Supp. 1310 (S.D. Miss. 1993), *vacated and remanded for clarification*, 115 S. Ct. 1684 (1995), *clarified*, No. 490-0043(2) (S.D. Miss. Dec. 29, 1995), *aff'd*, 64 U.S.L.W. 3815, 3820 (U.S. June 10, 1996).

Furthermore, there is simply nothing in the State's November 1994 NVRA manual setting out procedures for implementing a dual registration system. The State's submission requested the United States Attorney General to

"please regard the publication dated November 1994 and entitled 'the National Voter Registration Act' as Mississippi's plan to administratively implement NVRA on January 1, 1995." Summ. Judg. Mot. Ex. 10. Accordingly, the State's citation to one phrase contained in a background document -- a "Status Report" (Summ Judg. Mot. Ex. 6) appearing at p. 101 of the Section 5 submission -- does not remotely serve to convert the preclearance of the procedures in the NVRA manual into preclearance of a dual system of registration.[1] The phrase, which states in full "Make NVRA provisions applicable to state and local election to avoid a dual registration system," is included at the end of a list of bullet points describing other information, and was not even part of the documents which the Secretary of State described as the State's NVRA

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[1] The State's argument on this point also makes the faulty assumption that the *concept* of a dual registration system could be precleared without the State submitting any of the *actual procedures* to be used in implementing such a dual system -- procedures the State did not announce until February 10, 1995. Clearly, the State was required to make numerous discretionary choices in establishing such a system beyond the two narrow choices the State has cited (voter registration agencies and purge procedures). The State had to determine, for example, how registrants will be advised of their limited eligibility status and the necessity of registering separately for state and local elections; the procedures for cancelling, for state and local elections, the eligibility of thousands of voters registered in early 1995, including how to notify these voters of such cancellation (*e.g.*, announcements in the media, targeted mailings, both, or neither); whether and how to provide an opportunity to re-register for state elections; what deadline, if any, would apply to re-registration of those whose registration was cancelled; and how election officials would deal with voters who showed up on election day under the mistaken impression that they had the right to vote. The State cannot argue that it has received preclearance for any of the choices it made on these crucial matters.

implementation plan. Such a buried nugget is clearly insufficient to discharge the state's burden "to identify with specificity each change that it wishes the Attorney General to consider," *Clark*, 500 U.S. at 656; *see also Allen v. State Bd. of Elec.*, 393 U.S. 544, 571 (1969). Even the district court did not attach any significance to this phrase.

2. The State argues that the Secretary of State's Section 5 submission to the United States Attorney General ("Attorney General") was unauthorized, unratified, and incomplete, and therefore should not have been acted upon by the Attorney General. But even if this argument were factually defensible -- and it emphatically is not -- acceptance of the argument would be fatal to the State's legal position. If the Secretary of State's Section 5 submission, and the Attorney General's subsequent preclearance decision, should indeed be treated as nullities because the Secretary of State lacked authority to make the submission, then there is no longer *any* argument that Mississippi has obtained preclearance for its procedures implementing the NVRA. Under this "unratified act" theory, then, appellants, plaintiffs below, would be entitled to judgment as a matter of law declaring that Mississippi has implemented unprecleared voting changes.[2]

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[2] The conclusion that no valid Section 5 submission was ever made requires a finding of a Section 5 violation unless voting changes made to implement the NVRA are exempt from the Section 5 preclearance argument. As appellants pointed out in their opening brief, this Court's precedents, including *Allen v. State Bd. of Elec.*, 393 at 565 n.29, clearly hold that voting changes made to comply with federal law must nevertheless be submitted for Section 5 preclearance. J.S. at 27-29. While the State cites *Beer v. United States*, 425 U.S. 130 (1976), as contrary authority, Motion to Affirm at 9, the citation is simply mistaken, because *Beer* says absolutely nothing about this issue. The State has not even attempted to distinguish *Allen* or to argue that it was

However, in arguing that the Secretary of State's action in submitting and implementing a unified voter registration system was unauthorized and unratified -- reflecting merely "the carelessness of a mid-level State functionary" -- the State seriously mischaracterizes the undisputed facts. Motion to Affirm at 8. First, the State's plan for implementing a unified NVRA registration system as of January 1, 1995, far from being a secret known only to an official in the Secretary of State's office, was developed by the Secretary of State's office in conjunction with the State's NVRA Implementation Committee, which included key members of the Mississippi House and Senate, a representative of the Mississippi Attorney General's office, legal counsel from the Governor's office, and representatives of many other state agencies, as well as the so-called "mid-level State functionary," Constance Slaughter-Harvey, who was actually the General Counsel to the Mississippi Secretary of State and the Assistant Attorney General for Elections. Summ. Judg. Mot. Ex. 8.

Further, after participating in the development of this implementation plan, which changed very little between the first version published in July 1994 (Summ. Judg. Mot. Ex. 5) and the final version published in November 1994 (Summ. Judg. Mot. Ex. 10), the Implementation Committee sponsored numerous sessions statewide to train public officials and members of the public in the use of the new procedures --

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wrongly decided; indeed, the State's Motion to Affirm, like the district court's decision, does not even cite *Allen*. But even if *Allen* were not dispositive here -- and it is -- the NVRA goes further, expressly providing that the requirements of the NVRA do not "supersede, restrict or limit the application of" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1); *see also* 1973gg-9(d)(2). Again, the Motion to Affirm nowhere acknowledges these clear provisions.

procedures clearly implementing a unified registration system. In addition to dozens of meetings with citizen groups, the State's "Calendar of Efforts to Comply" lists significant training sessions with key groups of public officials and indicates that the NVRA manual was distributed at these sessions. Summ. Judg. Mot. Ex. 3, at 2-6. The purpose of such training sessions, as one of the contemporaneous documents states, was "to ensure that all officials are thoroughly prepared to implement the new programs and procedures beginning January 1, 1995." *Id.* at 7 (describing meeting attended by 133 officials representing 68 counties, *id.* at 9).

In sum, key legislative officials, representatives of the Attorney General and Governor's offices, county election officials statewide and hundreds of members of the public were aware of the details of the plan to implement the NVRA effective January 1, 1995. *See also* J.S. at 4. There is no evidence that in 1994 anyone ever objected to the plan or offered the opinion that its implementation beginning on January 1, 1995, would be an "illegal" or "unauthorized" act.[3]

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[3] There is no dispute as to these facts showing that the Secretary of State's implementation plan was well-understood among responsible state and local officials. But if there were any such dispute, the district court was required to resolve it in favor of appellants, plaintiffs below, because the court was ruling on motions for summary judgment. *Celotex Corp. v. Carrett*, 477 U.S. 317, 323 (1986). It is highly significant, moreover, that the summary judgment papers submitted by the State contained no affidavit asserting that the Secretary of State's actions were unauthorized by or unknown to other state officials. The State has made this assertion solely in its briefs.

If, however, the State were correct that changes in state voting procedures are invalid until made by the Mississippi Legislature, it

Indeed, the very notoriety of Mississippi's intent to begin implementing this plan on January 1, 1995, as required by the NVRA, led the United States Attorney General quite properly to point out the need for Section 5 preclearance in late 1994, since the new procedures had not yet been submitted. There was simply nothing secret or unauthorized about the changes in voter registration procedures that began in Mississippi in early 1995.

Further, the State is completely unable to distinguish this Court's authorities which clearly hold that covered jurisdictions may not evade the preclearance requirement by declaring their own practices to be a nullity. The City of Canton's argument in *Perkins v. Matthews*, 400 U.S. 370 (1971), was no different from the State's argument here: it contended that the State Legislature had the authority to prescribe the election system to be used by the city, and that no voting change occurred when the city simply corrected its previous illegal practice of using an election scheme barred by state law. *Id.* at 394 ("Canton now argues that it had no choice but to comply with the 1962 statute in the 1969 elections"). To borrow the State's term, the Mississippi Legislature was the relevant "body politic" in *Perkins* no less than in this case. Indeed, in *Perkins* there was no evidence at all that responsible agents of the State itself had ratified or authorized the acts of

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would follow that the procedures set forth in the State's February 10, 1995, memorandum are also invalid, because they were disseminated by an Assistant Attorney General and a Staff Attorney in the Secretary of State's office. There is no evidence of record that these procedures have been ratified by the Legislature or the Governor. The procedures, among other things, conflict with Mississippi law providing for a unitary voter registration system, Miss. Code Ann. § 23-15-11 (1990).

the City of Canton that were contrary to Mississippi law, yet the illegality of Canton's acts under state law were held irrelevant to the Section 5 inquiry. *A fortiori*, the same result follows here, where there *is* clear evidence that responsible State officials were fully aware of, and had participated in developing, the Secretary of State's implementation plan.[4]

3. Contrary to the State's argument, the Attorney General's February 1, 1995, preclearance of the submitted implementation plan reflects nothing improper, and the strained effort to invoke *Miller v. Johnson*, 115 S. Ct. 2475 (1995), is unavailing. The Attorney General was faced with the reality that the State was already conducting registration under the broad NVRA plan submitted in December 1994, and that such registration was being conducted prior to Section 5 preclearance. Withholding preclearance under these circumstances would have created its own difficulties, given

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[4] The State's effort to find case support for its position has yielded only *United States v. St. Landry Parish School Board*, 601 F.2d 859 (5th Cir. 1971), a case where Section 5 preclearance was held inapplicable to the illegal acts of vote-buying committed by three local election officials in one election district of one parish, because such illegal acts could not be considered "changes" administered by the state. As the *St. Landry* decision holds, "[a] voting procedure need not have the seal of the state to come within § 5, but it must be more than these isolated instances of bargaining for votes." 601 F.2d at 865. As the decision also recognizes, Section 5 covers not only those changes which are enacted by a state legislature, but also those changes which a state "'shall seek to . . . administer.'" *Id.* at 864 (quoting Section 5). The massive statewide mobilization for NVRA implementation which took place in Mississippi with full knowledge of responsible state officials does not remotely fit the narrow exception recognized in *St. Landry*.

that the changes were already being implemented.[5] Even the State's own subsequent memorandum of February 10, 1995, acknowledged that further legislative action in 1995, though perhaps unlikely, was not foreclosed by the committee's action. The grant of preclearance for the State's actual submission was entirely reasonable, especially considering that the State remained free to develop and submit for preclearance a different set of procedures if it ultimately decided that was necessary in light of the committee's action. The State still could do exactly that at any time by making the required submission.

4. The State's complaints regarding "bootstrapping" Section 5 and the NVRA are similarly without merit. The NVRA expressly provides that its requirements do not supplant the guarantees of the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1); *see also* 1973gg-9(d)(2). As the United States has pointed out, although Section 5 does not require all states to implement the NVRA in the same manner, it does require that a State's choices be free of discrimination. U.S. Brief at 20 n.10. Whether or not the State's choices are or were free of

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[5] There certainly is no merit to the State's suggestion that a preclearance decision is invalid simply because the Attorney General could have requested more information prior to issuing a preclearance letter, or because the submission arguably did not encompass every item of information listed in the regulations. Motion to Affirm at 18. Indeed, imposing such requirements as a predicate to a valid preclearance decision would backfire dramatically on covered jurisdictions such as Mississippi, and bring the Section 5 preclearance process to a standstill, by forcing the Attorney General to reject any Section 5 submission that does not include every specific statement and piece of information listed in the regulations. There is no support for such a crabbed and counterproductive interpretation of the Section 5 regulations.

discrimination, however, is simply not at issue in this Section 5 enforcement action, which solely addresses the question of whether the State must *submit* for preclearance the new procedures it adopted in its February 10, 1995, memorandum, not the question of whether preclearance should be *granted*. *Perkins*, 400 U.S. at 383-85.

CONCLUSION

The decision below should be summarily reversed. In the alternative, the Court should note probable jurisdiction.

Respectfully submitted,

A. SPENCER GILBERT, III
J. WILLIAM MANUEL
WISE CARTER CHILD & CARAWAY
401 EAST CAPITOL STREET
SUITE 600
JACKSON, MS 39201
(601) 354-2385

BARBARA R. ARNWINE
THOMAS J. HENDERSON
*BRENDA WRIGHT
SAMUEL L. WALTERS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G STREET, N.W.
SUITE 400
WASHINGTON, D.C.20005
(202) 662-8320

MARGARET CAREY
CENTER FOR
CONSTITUTIONAL
RIGHTS
213 Main St.
Greenville, MS 38701
(601) 334-1122

LAUGHLIN MCDONALD
NEIL BRADLEY
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION, INC.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

* Counsel of Record

Counsel for Appellants